The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam

Gregory S. Alexander
Cornell Law School, gsa9@cornell.edu

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lYING AT THE HEART OF ALL CONFLICTS THEORIES IS A RECOGNITION THAT THE FUNCTION OF THE LAW OF CONFLICTS IS TO ENSURE RATIONAL AND JUST SOLUTIONS TO CONTENTIOUS INVOLVING FOREIGN ELEMENTS. A JUST AND RATIONAL SOLUTION IS ONE THAT SOMEHOW ACCOMMODATES THOSE ELEMENTS. THIS DOES NOT MEAN THAT THE FOREIGN LAW MUST BE APPLIED BUT SIMPLY SUGGESTS THAT AT LEAST SOME ATTENTION SHOULD BE PAID TO THAT LAW IN THE PROCESS OF RESOLVING DISPUTES. FROM THESE RELATIVELY UNCONTROVERSIAL POSTULATES, ONE MOVES TO THE MORE DIFFICULT PROBLEM OF DEFINING THE ROLE OF FOREIGN LAW IN THE CONFLICTS SETTING.

ATTENTION IN THIS AREA IS USUALLY FOCUSED ON THE THEORETICAL BASES FOR THE DISPLACEMENT OF FORUM LAW BY SOME FOREIGN RULE RELATED TO THE MATTER THROUGH ONE OR MORE CONNECTING FACTORS. However, implicit in attempts to develop normative standards for choosing foreign substantive rules is the assumption that those rules can be applied by the forum in some sensible fashion. To assume otherwise renders

* The author is greatly indebted to Alexander Nekam, now Professor Emeritus at Northwestern University School of Law, under whom research for this paper was begun as part of Northwestern's Senior Research Program. For those parts of this analysis which are inconsistent with Professor Nekam's views the author accepts full responsibility. Professor Nekam's theme was foreshadowed in his earlier book, A. NEKAM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY (1938), and is reflected in his recent article, Nekam, The Law of Conflicts and Comparative Law: Some Similarities and Limitations, 34 LA. L. REV. 1077 (1974). He plans to publish a general exposition of his conflicts theory in the near future. The author also wishes to acknowledge his appreciation for the assistance provided by Professor Max Rheinstein of The University of Chicago Law School.

† Assistant Professor of Law, The University of Georgia; B.A., University of Illinois at Urbana-Champaign, 1970; J.D., Northwestern University, 1973.

conflicts rules—other than those which direct the application of forum law in all circumstances—meaningless. But in what sense can it be said that the forum applies any law other than its own? Most commentary on this question has directed itself to such practical concerns as the effect of failing to plead foreign law. While these issues are by no means insignificant, a fuller understanding of the problems involved in the application of foreign law must be based on the premise that foreign law is different in kind from the law of the forum and that this difference frequently affects the way in which the forum treats the foreign law. This article examines the means by which courts in the conflicts setting have attempted to accommodate the relevant foreign elements and attempts to explain what it means for the forum to apply a foreign law. The intent here is primarily descriptive: to clarify what we are talking about when we say that the forum applies a foreign law.

THE PROBLEM DEFINED

Nearly all legal systems require that foreign law be applied in some appropriate circumstances. However, the rules directing application of a foreign law do not provide standards for carrying out this responsibility.

It might be argued that problems involved in the application of foreign law are no different from difficulties encountered in applying forum law. Courts are frequently required to deal with unfamiliar domestic statutes, yet this occasionally imperfect knowledge of domestic law does not refute the general presumption jura novit curia. Simi-

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2 See, e.g., Schlesinger, A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law, 59 CORNELL L. REV. 1 (1973) [hereinafter cited as Schlesinger].

3 "Foreign law" as used in this article refers to both foreign country rules and sister-state law, unless otherwise noted. One caveat should be added, however; the problem of applying a sister-state foreign law is usually not as acute as that of applying the rule of another nation. While some material differences do exist among the laws of the several states, they are not nearly as frequently encountered as differences with foreign national laws. In a similar vein, degrees of difference exist with regard to foreign country rules. The laws of common law nations, for example, are more likely to parallel our own on a given topic than are the rules of, say, Zaire. These observations are not intended as truisms, but simply to acknowledge at the outset that the foreign law "problem" is not monolithic.

4 Appropriate circumstances are defined by the conflicts rules of the forum.

5 It might be said that in the context of interstate conflicts the Constitution provides a standard in the full faith and credit clause. U.S. Const. art. IV, § 1. But even its language does not go very far in explaining how the forum is to give credit to a foreign state's rule.
larly, the forum's knowledge of foreign law may be imperfect, but the responsibility of learning that law as a condition to applying it is the same in these circumstances as it is with regard to unfamiliar domestic law. One weakness of this analogy is that instances of unknown or unfamiliar domestic law, though perhaps not infrequent, are the exception. Total ignorance or imperfect knowledge of foreign law, on the other hand, is the rule. This lack of knowledge is "a natural consequence of the training of the judges in the law of their own country." 6

Moreover, when confronted with an unfamiliar domestic legal rule, the forum court has the advantage of being able to study it in a familiar context. 7 The rule will be viewed in relation to other relevant provisions of domestic law with which the court is presumably acquainted. The advantage which this circumstance gives the forum court is considerable. Rules cannot be fully understood in isolation; they are interrelated and in some instances interdependent. 8 When the court is called upon to learn and apply a foreign rule, it will necessarily view that rule in relative isolation. Even if it attempts to develop its understanding of the foreign law by examining related provisions, the forum still lacks that exposure to the foreign system which is essential to a complete understanding of the single provision. 9

Nevertheless, the view that foreign law can be reached and applied as easily as domestic law still prevails. 10 This notion is

7 The difference of contexts and relative familiarity with contexts supports the distinction, earlier noted, between sister-state law and foreign nation law. Although an Illinois judge is not likely to be as familiar with Indiana law as he is with his own state's rules, he will have considerably greater grasp of Indiana law than German law. While important differences between Illinois and Indiana law may and do exist, the context of Indiana law is relatively familiar to the Illinoisian. See note 3 supra.
8 This idea is explained and developed on a jurisprudential level in J. Raz, The Concept of a Legal System (1970) [hereinafter cited as Raz]. The chapter entitled "On the Individuation of Laws" is particularly useful in this regard.
9 The Supreme Court recently recognized that this difficulty may exist even in the interstate context. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).
10 See, e.g., Schlesinger, supra note 2. A less accepted view is that only an impression of foreign law can be achieved. This dichotomy of approaches to the treatment of foreign elements reflects the historical struggle between general theories of conflicts law. From early on, the competing tendencies have been centrifugal and centripetal, or to borrow Ehrenzweig's language, pluralistic and unitarian. The latter attempts to resolve conflicts through an assumed higher law, while pluralism
reflected, for example, in our choice-of-law rules, which implicitly assume that a foreign rule may be applied with the same confidence as a familiar domestic rule. This assumption is indicated by a basic purpose which conventionally is ascribed to choice-of-law rules—uniformity of result. The flaws in this approach to the foreign law problem become apparent, however, when one examines both the difficulties encountered by the courts in their attempts to reach and apply foreign law and the techniques employed to avoid these difficulties.

TECHNIQUES FOR HANDLING FOREIGN LAW QUESTIONS

A variety of techniques is available to the forum in resolving foreign law problems. Not all of them, however, require the court to confront the task of finding and enforcing a foreign law which is ostensibly applicable. Courts continue to resort to well-established procedural devices which avoid the problem and at the same time mask the difficulties involved in reaching any foreign law. Judicial notice and presumptions as to the content of foreign law, for example, allow the courts to create the appearance of having determined the law to be applied, yet they are essentially nonconflicts techniques which implicitly deny the existence of an alien law.

The Fact Approach to Foreign Law

Before these techniques are considered, it is helpful to discuss briefly the common law's "fact" approach to resolving foreign law questions, which was adopted by American courts and has persisted in most jurisdictions to the present day. Foreign rules, upon which a party seeks to rely, are regarded not as elements of a legal system, but as facts which have to be pleaded and proved by the litigant.

denies the existence of any legal order higher than that of the forum. See A. Ehrenzweig, A TREATISE ON THE CONFLICT OF LAWS 3-16 (1962) [hereinafter cited as Ehrenzweig]; Yntema, The Historical Bases of Private International Law, 3 AM. J. Comp. L. 297 (1953).

11 Professor von Mehren recently suggested that the movement by courts and writers away from rigid conflicts rules has been associated with a minimization of the importance of uniformity as a primary goal of the law of conflicts. von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 HARV. L. REV. 347, 350-56 (1974) [hereinafter cited as von Mehren].

12 See note 27 infra.

13 For a more complete discussion on the source of the fact approach, see Sass, Foreign Law in Civil Litigation: A Comparative Survey, 16 AM. J. COMP. L. 332, 335-39 (1968) [hereinafter cited as Sass].
The asserted theoretical justification for this rule is that, since the forum is capable of applying only domestic law, every other element in the case must be treated as a fact to be proved. Failure to comply with this requirement often resulted in immediate dismissal of the claim based upon a foreign law.

It is useful to examine the fact approach for two reasons. First, the view that foreign law is a fact provides a theoretical foundation for the techniques of applying—or avoiding—foreign law. Second, this approach facilitates the accommodation of foreign elements, by providing a simple solution to the procedural and evidentiary difficulties encountered when foreign elements are introduced. The parties are required to present to the court the foreign rule sought to be applied, thus relieving the court of the burden of conducting its own research. Moreover, adherence to the fact approach serves to rationalize a court’s consideration of the precise foreign rule pleaded in isolation rather than as it relates to other provisions in the foreign legal system. As the court cannot consider facts not stated in the pleadings—apart from the judicial notice exception—it may not refer to a foreign legal “fact” not pleaded by the parties.

The classic illustration of this approach and its “sudden death” consequences is Cuba R.R. v. Crosby. The Supreme Court, speaking through Justice Holmes, refused to take cognizance of a cause of action for a tort committed in Cuba because no evidence was offered on Cuban law. The lower court had held that if Cuban law differed from the lex fori, the defendant had the burden of alleging and proving so. However, in the absence of such evidence, it would apply the law as it conceives it to be, according to its idea of

14 See generally O. SOMMERICH & B. BUSCH, FOREIGN LAW: A GUIDE TO PLEADING AND PROOF 11-12 (1959) [hereinafter cited as SOMMERICH & BUSCH].
15 Frequently, however, dismissal is ordered with leave to replead. See, e.g., Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1956).
16 This comment anticipates objections to the fact approach which are based upon a jurisprudential discussion of the individuation of laws. See generally RAZ, supra note 8, at 70-92.
17 It may be contended that this exception is so broad as to negate the rest of the statement. The field of judicial notice arguably encompasses all facts not contained in the pleadings. But this contention clearly cannot withstand scrutiny. Under any view of judicial notice, there are some facts of which the court may not take judicial notice, though it is not necessary for present purposes to give a general account of these facts. See, e.g., FED. R. EVID. 201. See generally J. MAGUIRE, J. WEINSTEIN, J. CHADBORN & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 12-31 (1973).
18 222 U.S. 473 (1912).
19 Id. at 477 (quoting the lower court opinion).
right and justice; or, in other words, according to the law of
the forum.

Justice Holmes rejected this approach and reaffirmed the common
law view of foreign law and foreign "rights":\textsuperscript{20}

[T]he only justification for allowing a party to recover when
the cause of action arose in another civilized jurisdiction is a
well founded belief that it was a cause of action in that place.
The right to recover stands upon that as its necessary founda-
tion. It is part of the plaintiff's case, and if there is a reason
for doubt he must allege and prove it.

The common law's fact approach to foreign law comported with
the views of Joseph Beale and other vested rights theorists, including
Justice Holmes. Beale posited that every act creates within its territo-
rial boundaries definite rights or obligations, and the forum is obliged
to recognize and enforce these rights even though they are foreign
created.\textsuperscript{21} Foreign law, however, operates within the forum only as a
\textit{fact},\textsuperscript{22} since every law is strictly territorial in operation\textsuperscript{23}
and therefore cannot function as \textit{law} outside its territorial parameters. It should be
noted that this theory does not indicate when foreign rights should be
protected by the forum; rather it explains \textit{how} the foreign right is
enforced.

The internal law of the forum which is applied, in Beale's view,
is that "which deals with the solution of conflicts."\textsuperscript{24} If the internal
law dictates that in a given situation a foreign law supplies that
solution, then the forum is required to look to that law. Foreign law
is not "applied" in the sense that it directs the decision. Rather, "the
national law provides for a decision according to certain provisions of
the foreign law."\textsuperscript{25} Foreign law is relevant only as a fact which must
be proved according to the approach of the internal law of the forum.

\textsuperscript{20} \textit{Id.} at 479 (emphasis supplied).
\textsuperscript{21} An extreme instance of effect being given to this view is the majority opinion
in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904), where Justice Holmes wrote:
The theory of the foreign suit is that although the act complained of was sub-
ject to no law having force in the forum, it gave rise to an obligation, an ob-
ligatio, which, like other obligations, follows the person, and may be enforced
wherever the person may be found.
\textit{Id.} at 126.
\textsuperscript{22} 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.4 (1935) [hereinafter
cited as BEALE].
\textsuperscript{23} \textit{See id.} § 5.2; 2 BEALE, supra note 22, § 377.2; RESTATEMENT (FIRST) OF
CONFLICT OF LAWS § 1, at 378-79 (1934).
\textsuperscript{24} 3 BEALE, supra note 22, § 73, at 1968.
\textsuperscript{25} \textit{Id.}
While Beale's vested rights theory has been thoroughly discredit-
ed, the fact approach persists. It has been suggested that the
enactment of rule 44.1 of the Federal Rules of Civil Procedure
signaled the demise of the common law fact approach. However,
even though rule 44.1 provides that "[t]he court's determination
shall be treated as a ruling on a question of law," the foreign law issue
is, for some purposes, still treated as a question of fact. Adherence
to the fact approach permits a court to avoid the problem of ascer-
taining and applying the foreign law in its entirety. As mentioned
previously, the burden of discovering the applicable foreign law
rests upon the parties, and, if this responsibility is not satisfied, the
court may dismiss the contention based on that law. Since this
consequence seems unduly harsh, strict adherence to the fact ap-
proach is relatively rare. Instead, the courts have resorted to fictions
which avoid both the foreign law problem and the sudden death
consequences of the fact approach.

Presumptions as to Foreign Law

In order to avoid a detailed examination of a foreign legal
system, courts, under the guise of enforcing foreign law, have fre-
quently resorted to presumptions about the content of that foreign
law. The use of presumptions is rationalized on the ground that they
enable a court to reach the same result that would have been reached
by a court in the foreign jurisdiction. In practice, however, the

26 The first and perhaps most thorough attack was mounted by Professor Walter
Wheeler Cook. See W. Cook, The Logical and Legal Bases of the Conflict of
Laws (1942).

27 For a collection of statutes reflecting the fact approach, see R. Schlesinger,

28 Fed. R. Civ. P. 44.1. See Miller, Federal Rule 44.1 and the "Fact" Approach
Rev. 613, 657 (1967) [hereinafter cited as Miller].

29 The intent of rule 44.1 was merely to indicate that the court, not the jury, has
the responsibility of resolving the foreign law issue and that this determination is
to be treated on appeal as legal rather than factual. Moreover, the second sentence
of the rule shows that it was not the intent of the draftsmen to equate foreign law
and domestic law for all purposes. Had that been the intention, the court would
have been given the complete responsibility for ascertaining the foreign law, but
the rule leaves to the court's discretion the decision whether to take judicial notice
of a foreign rule. See Sass, supra note 13, at 342-47.

30 See text accompanying notes 12-20 supra.

31 See generally 3 Beale, supra note 22, §§ 622A.1-23.1; Currie, supra note 1,
at 21; Sommerich & Busch, supra note 14, at 75-80; Kales, Presumption of the
Foreign Law, 19 Harv. L. Rev. 401 (1906); Miller, supra note 28, at 634; von
Application of Foreign Law

commonly employed presumptions simply permit the forum court to apply its own law.

Essentially, three foreign law presumptions have been employed by the courts:32 (1) the court will presume, in the interests of "inherent justice," that the rudimentary principles of law necessary to support the claim are recognized in all civilized countries and that the foreign state in question, being civilized, would give effect to the claim;33 (2) the law of the foreign state will be presumed to be the same as the law of the forum, where both states were originally part of the common law world; and (3) the law of the foreign state, regardless of the history of its legal system, is presumed to be the same as the law of the forum.34

One objection to the first presumption is that the test for determining which principles are rudimentary is inherently subjective. One writer has remarked that "the difference between rudimentary principles and subtle refinements is quite arbitrary."35 Moreover, the courts appear quite uncertain as to whether the rudimentary principles are capable of identification or whether they are more akin to a priori natural law concepts which are not susceptible to cataloguing.36 Under either view, it is likely that resort to such principles is a mere guise for avoiding the foreign law question.37


32 See, e.g., CURRIE, supra note 1; Miller, supra note 28. See also Schlesinger, supra note 2, at 7-8.


34 The presumptions may vary depending upon whether they cover statutory pronouncements as well as case law.

35 CURRIE, supra note 1, at 22.

36 It is quite possible that the meaning of this expression changes with the currently popular ideas. Thus at the time of the Parrot decision, the court may have been referring to natural law principles. Presently, however, the court's reference to "rudimentary principles of law" may be directed toward some universal behavioral norm. See 1 R. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (1968):

[O]nce such principles are established, independently of a particular litigation, as pre-existing norms discovered through disinterested scholarly research, there will be less reason to fear arbitrary judicial action.

Id. at 11.

37 Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911), aptly il-
Perhaps because of the arbitrariness of determining which principles are "rudimentary" and the inconsistency of decisions using the first presumption, the second presumption has been more frequently employed. The court presumes that the common law still prevails in the foreign jurisdiction and that it is the same as the law of the forum. Arguably, this presumption could originally have been justified on the ground that the common law acted as a kind of higher law with only slight variances in content among the several common law jurisdictions. Gradually, however, the identity presumption was extended into a third presumption covering situations in which the foreign state involved was not a common law jurisdiction.

Illustrative of this third presumption is *Louknitsky v. Louknitsky*, a divorce suit in which the wife claimed certain California realty as her separate property. The real property was purchased in large part with the earnings and proceeds of earnings of the defendant husband while both parties resided in China. The parties subsequently moved to California. Because neither side pleaded or introduced evidence concerning Chinese law, the court presumed that Chinese marital property law was the same as California's community property law. Thus the funds acquired in China were considered community property.

Apart from the questionable result, the court's approach was little more than a thin disguise for the application of the forum's law without regard to the peculiarities of the lex fori and without illustrating judicial fiat through the use of presumptions. In this action for breach of an alleged oral contract, the court indulged in the view that in an action upon a simple contract of this kind, there is a broad general presumption of the fact that such a contract creates a liability in all civilized countries....

*Id.* at 194, 93 N.E. at 594. The enforceability of an oral contract of this kind in civil law nations is highly suspect, even in countries such as France. See C. Crv. art. 1341 (69e ed. Petits Codes Dalloz 1970). See also Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962) (applying fundamental principles of Oklahoma tort law but not the Oklahoma Workmen's Compensation Act, in the absence of proof of Turkish law); Enter v. Crutcher, 159 Cal. App. 2d 841, 323 P.2d 586 (1958) (Costa Rican law governing bills of exchange presumed to be the same as that of the forum in the absence of evidence to the contrary).


California community property law is peculiar even in the United States. How likely is it, then, that it is the same as Chinese law?
acknowledgment of the radical difference between the legal systems. Whatever justification the identity presumption may have had originally, its use is wholly inappropriate in circumstances where there is little or no correspondence between the lex fori and the law of the foreign jurisdiction. Like the "rudimentary principles" presumption, then, the presumption of identity became an obvious device for avoiding the foreign law issue.

A more satisfactory approach to the problem was taken in Leary v. Gledhill. In an action to recover on an alleged loan made in France by plaintiff to defendant, the plaintiff failed to introduce evidence as to the law of France. The court first surveyed the alternative methods of handling the foreign law issue in the absence of proof of that law. It rejected the presumption that the common law exists in the foreign jurisdiction, stating that, while the presumption might be useful in other situations, it was not helpful here because the common law on the subject had been altered by statute in the forum and did not exist in the foreign state. Also rejected was the presumption that French law, like the law of all civilized countries, recognizes as a fundamental principle that the mere fact of a loan creates an obligation on the part of the borrower to make repayment. The court recognized that in many cases it may be difficult to ascertain whether the principle presented is so fundamental as to warrant the assumption that it would be similarly applied by all civilized nations. Having rejected the identity and fundamental principle presumptions, the court concluded:

The presumption that in the absence of proof the parties acquiesce in the application of the law of the forum, be it statutory law or common law, does not present any such difficulties for it may be universally applied regardless of the nature of the controversy.

42 It is worth noting that the transition from employing the presumption of identity among common law states to jurisdictions outside the common law group may occur without any acknowledgment. By tracing the decisions on which the Louknitsky court relied, this development will be seen. The court cited as support Christ v. Superior Court, 211 Cal. 593, 598, 296 P. 612, 614 (1931), where the foreign law was that of Guatemala. The Christ opinion cited Wickersham v. Johnson, 104 Cal. 407, 38 P. 89 (1894), where English law was involved, but the opinion contains no reference to the difference between the common law and the civil law system. The earliest California case on this question appears to be Norris v. Harris, 15 Cal. 226, 252-54 (1860), where the court, in an opinion by Judge Field, carefully distinguished the second and third presumptions.

43 8 N.J. 260, 84 A.2d 725 (1951).
44 See Currie, supra note 1, at 22-23.
45 8 N.J. at 269-70, 84 A.2d at 730.
Although a more sensible approach to the foreign law problem than those rejected by the court, the acquiescence rationale still adheres to the questionable presumptive form. Why should the court presume any intent of the parties? Why should it not simply apply its own law in the absence of proof of the foreign law? This would surely be the more straightforward course to follow, for:

however artificial may be the reproductions [which presumptions] yield of the foreign law, their general tendency is to bring about the application of the law of the forum . . . .

The presumption technique has come under increasing attack by courts as well as commentators. In *Old Hickory Products, Ltd. v. Hickory Specialties, Inc.*, Hickory Specialties, sued by Old Hickory Products for unfair advertising and wrongful appropriation of trade secrets, demanded that its insurer defend the suit under its contract of insurance. Upon the insurer’s refusal, Hickory Specialties defended itself and filed a third party complaint against the insurer for all sums for which it might become liable. The parties stipulated that the insurance contract was entered into and delivered in Florida. The law of Georgia, the forum state, provided that the construction of the contract is governed by the law of the place of its making (Florida). The defendant insurer moved for summary judgment on the ground that under Florida common law the existence of an insurer’s obligation to defend is determined by the allegations in the plaintiff’s pleadings and that plaintiff’s original pleadings alleged conduct by the insured not covered by the policy. Old Hickory responded that, while Florida law governs the construction of a contract, under the *Erie-Klaxon* rule a federal court in Georgia must follow the interpretation which the Georgia courts would give Florida law, and, accordingly, the insurer had the duty to defend if, under the actual circumstances of the case, whether or not properly pleaded, the policy

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46 Apart from objecting to the acquiescence theory on the ground of its presumptive form, it is also undesirable because it would allow a foreign law to be applied only where both parties are subjects of the same foreign jurisdiction or where both sides are from different nations having the same legal system. *See* The Scotland, 105 U.S. 24, 31-32 (1881). This would create an unfairly narrow range of situations in which the forum might apply a foreign law.

47 *Currie, supra* note 1, at 50 (footnote omitted). Currie here makes reference to the decision in *Leary*.


afforded coverage to the plaintiff and those circumstances were
known or were reasonably ascertainable by the insurer. 50

Under Georgia case authority, in order for a foreign statute to be
considered by the forum court it had to be pleaded and proved. If
this requirement was satisfied, the case law of the foreign state could
then be consulted when interpretative of the statute. However, when,
as here, there was no foreign statute governing the issue in dispute,
the Georgia courts would presume that the common law prevailed in
that state and the courts of Georgia would not be bound "by the
interpretation of the common law made by the courts of a foreign
state, but will decide what is the common law." 51

The district court rejected this approach, indicating its disen-
chantment with the sophistry of presumptions: 52

In the present action, then, while paying lip-service to the no-
tion that Florida law should govern the construction of a con-
tact made in Florida . . . the Georgia courts would apply
Georgia's interpretation of "the common law," or more simply,
Georgia law.

Concluding that Florida law alone was applicable, the court noted
that a recently enacted Georgia statute had eliminated the earlier
decisional rule requiring the pleading and proving of foreign statutory
law and barring the Georgia courts from looking to foreign case
law. 53 The court observed that the new statute was enacted in part to

50 See Tennessee Corp. v. Hartford Accident & Indemnity Co., 463 F.2d 548
(5th Cir. 1972); Associated Petroleum Carriers v. Pan American Fire & Casualty
Co., 117 Ga. App. 714, 161 S.E.2d 411 (1968); State Farm Mutual Automobile Ins.

S.E.2d 897, 899 (1944); Budget Rent-A-Car Corp. v. Fein, 342 F.2d 509 (5th Cir.
1965); Jesse Parker Williams Hospital v. Nisbet, 189 Ga. 807, 811, 7 S.E.2d 737
(1940); Record Truck Line, Inc. v. Harrison, 109 Ga. App. 653, 137 S.E.2d 65
(1964). With regard to this rule, Judge Brown in Budget Rent-A-Car observed:
The traditional function of conflicts-of-laws rules in contracts is to afford a
degree of certainty and symmetry as controversies stray to localities which are
strangers. They need not, therefore, necessarily make sense. There are judicial
outcroppings in Georgia which reflect some dissatisfaction with a rule that, in
this day and time with the plethora of law publications, digests, reports, law
reviews, and texts, still "presumes"—without the slightest inquiry which a good
Georgia lawyer would make—that the law of another state (here, right next
door) in the Union is the same as Georgia.

342 F.2d at 514 n.9. What Judge Brown fails to take into account is that while
a conflict-of-laws rule which is not entirely sensible may sometimes be justified on
the basis of expediency and necessity, it cannot be justified where a more sensible
alternative exists. In this instance several alternatives, all preferable to the Georgia
rule according to Judge Brown's criteria, were available.

52 366 F. Supp. at 915 (footnote omitted).

53 GA. CODE ANN. § 81A-143(c) (1972). This Act is substantially identical to
avoid the presumption of identity\textsuperscript{54} and cited Louknitsky as exemplary of the strained reasoning which the statute was intended to eliminate.\textsuperscript{55} This statute, then, eliminated all vestiges of the common law's restrictions against recognizing foreign decisional law and allowed the court to look to Florida cases as supplying the rule of decision.\textsuperscript{56}

\textit{Judicial Notice of Foreign Law}

Dissatisfaction with the presumption technique increased until some states enacted statutes permitting courts to take judicial notice of a foreign rule not pleaded or proved.\textsuperscript{57} These statutes were rule 44.1 of the Federal Rules of Civil Procedure, and the court looked to the federal rule as a guide in interpreting the Georgia Act. The only significant difference between rule 44.1 and the Georgia statute is that while the federal rule applies only to foreign nation law, section 81A-143(c) applies to sister-state law as well.

\textsuperscript{54} See text accompanying notes 13-29 supra.

\textsuperscript{55} 366 F. Supp. at 920-21. The court's characterization of the identity presumption is unusually straightforward:

Not to be omitted from the difficulties inherent in a presumption of identity is the unreality attendant to a doctrine which insists that the common law of Georgia and Florida are the same, when a look into the Southern Reporter, forbidden by that presumption, will show that they are not.

\textit{Id.} at 921.

\textsuperscript{56} Despite its realistic appraisal of common law presumptions, the court in \textit{Old Hickory} erroneously viewed the presumption as related only to the procedural requirement that foreign law be pleaded and proved. The presumption was, in the court's view, divorced from any substantive choice-of-law rule and, therefore, had never been determinative as to which of two state laws shall apply:

The presumption of identity has always been invoked after the ritual incantation that no law or statute of the controlling state was pleaded. To the court, this careful separation between the controlling state law and the interpretation to be given to that law demands the conclusion that the presumption of identity, rather than being a substantive choice-of-law rule, is part and parcel of Georgia's adherence to the common-law rule that foreign law be pleaded and proved.

\textit{Id.} at 920. In effect, the court concluded that presumptions are procedural rather than substantive in character.

The court failed to recognize that the common law presumption of identity or any presumption of law has the effect of resolving the choice-of-law issue. In some instances, in fact, it is intended to have precisely that effect. Georgia law may provide that lex loci delicti governs but if the lex locus is presumed to be the same as Georgia's common law, the presumption, characterized by the \textit{Old Hickory} court as merely interpretive of the lex locus, in effect furnishes the rule of decision. It is not purely procedural but rather part and parcel of the substantive choice-of-law rule.

This distinction is not without effect. As Professor Schlesinger has stated, it has serious ramifications with regard to \textit{Erie} questions. \textit{See} Schlesinger, \textit{supra} note 2, at 5.

\textsuperscript{57} \textit{See}, e.g., Ga. Code Ann. § 81A-143(c) (1972). In Seaboard Air-Lines R'y.
designed to avoid the same undesirable consequences which flow from the fact approach and its pleading requirement as the presumptions had sought to remedy, i.e., dismissal of the foreign law-based arguments of one of the litigants. The court could, through judicial notice, determine the foreign law without proof by the litigants. Failure by one of the parties to establish the foreign law applicable to his case would theoretically no longer result either in dismissal or in presumptive application of the law of the forum. The court ostensibly would seek out the foreign law and actually apply it.

Judicial notice statutes, however, have not provided a satisfactory solution to the foreign law problem. Such statutes normally leave to the court's discretion the decision whether to take judicial notice of a foreign law, and, as one commentator has noted, "In exercising this discretion, courts naturally are disinclined to engage in independent research concerning a strange legal system if they receive no help from counsel." This has led to the occasional judicial practice of refusing to take judicial notice unless the parties assist in the information-gathering process. In Arams v. Arams, for example, the court stated:

I think the new enactment [the New York judicial notice statute] was intended merely to dispense with certain formalities respecting the manner in which the law of the state or country whose law is first appropriately invoked and determined to be applicable may be brought to the attention of the court by the parties, and, in case they may omit something pertinent, to give the judge the right to make further researches in order to supplement or round out what the parties have presented so as to make an accurate determination of what the law of that state or country really is. In short, the enactment was intended as

v. Phillips, 117 Ga. 98, 43 S.E. 494 (1903), the court in dictum had expressed strong unhappiness with the presumption approach. That presumptions are often not empirically correct is reflected by the Supreme Court's statement that:

It does not seem justifiable to assume what we all know is not true—that French law and our law are the same. Such a view ignores some of the most elementary facts of legal history—the French reception of Roman law, the consequences of the Revolution, and the Napoleonic codifications.


See SCHLESINGER, supra note 27, at 67-69.

Schlesinger, supra note 2, at 16.


182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

Id. at 330-31, 45 N.Y.S.2d at 253-54 (discussing N.Y.R. CIV. PRAC. 4511).
a safety valve against miscarriages of justice due to mistake, and
not as a charter to every judge to apply whatsoever law he likes
and can find.

The concern with allowing the court to conduct its own foreign
law research is twofold: first, where the law is that of a foreign
nation, judges are usually thought to be ill-prepared to carry out this
responsibility alone; second, judicial notice may be unfair to the
parties if the court has not informed them of its intent to research and
apply a foreign rule. The first ground of concern is reflected in the
many statutes which do not extend judicial notice to foreign nation
law at all. The second basis of concern has been addressed by
statutes which require that the court give the parties formal notice of
its intent to raise and research a foreign law issue, but this practice
is not at all uniform.

The judicial notice statutes may have no application at all if the
parties fail to give notice of their intent to rely on a foreign law, that

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63 See generally Sommerich & Busch, supra note 14, at 60-69. Courts frequently
have stated that they are not precluded from conducting independent research to
ascertain the law. See, e.g., Siegelman v. Cunard White Star, Ltd., 221 F.2d 189
(2d Cir. 1955) (English law); Pfeuger v. Pfeuger, 304 N.Y. 148, 106 N.E.2d 495
(1952) (Pennsylvania law); In re McDougald's Estate, 272 App. Div. 176, 70
N.Y.S.2d 200 (3d Dept.), aff'd 63 N.Y.S.2d 895 (Sup. Ct. 1946) (Canadian law);
Olson v. Kilian, 203 Misc. 847, 119 N.Y.S.2d 94 (Sup. Ct. 1953) (Ontario law);
In re Baruch's Estate, 205 Misc. 1122, 131 N.Y.S.2d 84 (Sup. Ct. 1954) (Dutch law):
In re Grant-Suttie, 205 Misc. 640, 129 N.Y.S.2d 572 (Sup. Ct. 1954) (Canadian
law).

64 See, e.g., Sonnesen v. Panama Transp. Co., 298 N.Y. 262, 82 N.E.2d 569
(1948); In re Mason, 194 Misc. 308, 86 N.Y.S.2d 232 (Sur. Ct. 1948).

65 One commentator contends that the court is constitutionally required by due
process to give the parties notice and an opportunity to argue the foreign law.
Schlesinger, supra note 2, at 24, 25. See also 9 J. Wigmore, Evidence § 2573 (3d
ed. 1940); Nussbaum, Proving the Law of Foreign Countries, 3 Am. J. Comp. L.
60 (1954) [hereinafter cited as Nussbaum]; Nussbaum, The Problem of Proving
Foreign Law, 50 Yale L.J. 1018 (1941) [hereinafter cited as Nussbaum, The Prob-
lem].

66 The Uniform Judicial Notice of Foreign Law Act, 9A Uniform Laws
Ann. 569 (1965), sets the pattern here:
The law of a jurisdiction other than those referred to in Section 1 [foreign
nation law] shall be an issue for the court, but shall not be subject to the fore-
going provisions concerning judicial notice.

67 See, e.g., Cal. Evid. Code §§ 455(a), 459(c), (d) (West 1966).

68 The federal practice presently is not to require the court to issue formal notice,
although the Advisory Committee Notes state that "the court should give the parties
an opportunity to analyze and counter new points upon which it proposes to rely."
Notes of Advisory Committee on Rules, Fed. R. Civ. P. 44.1.

69 This is the effect of the notice requirement in rule 44.1. In Ruff v. St. Paul
Mercury Ins. Co., 393 F.2d 500, 502 (2d Cir. 1968), the court held that unless
is, if they fail to satisfy the pleading requirement. The classic example of the sudden death effect of the pleading requirement is *Walton v. American Arabian Oil Co.*\(^7^0\) where the Second Circuit held that the complaint must be dismissed because the plaintiff failed to plead the applicable foreign law. It stated:\(^7^1\)

[A] court "abuses" its discretion under that statute [New York's judicial notice statute] perhaps if it takes judicial notice of foreign "law" when it is not pleaded, and surely does so unless the party . . . has in some way assisted the court in judicially learning it.

In effect, the court reverted to the questionable strict pleading and proof requirement of the common law. Under the *Walton* analysis, judicial notice statutes are relegated to a very minor role,\(^7^2\) and the court's freedom to explore the foreign law issue is severely limited.

Judicial notice statutes were designed to provide the forum court sufficient flexibility to prevent foreign law issues from being lost or hidden, and to allow the court, with or without the assistance of counsel, to research the foreign law in order to insure that the foreign

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\(^7^0\) Another instance of a federal court's refusal to avail itself of the New York statute is Telesphore Couture v. Watkins, 162 F. Supp. 727 (E.D.N.Y. 1958). The basis for failing to take judicial notice there, however, was stated more explicitly than in *Walton*. The court observed:

Although this court has the power to take judicial notice of a foreign statute it does not have the facilities with which to do so. Only recently has this court begun to establish and maintain a central law library. Unfortunately, due to causes beyond the control of the court, this library does not contain nor will it contain for some time to come, the statutes of the several states of the Union, much less the statutes of any foreign country. This court does not feel it incumbent upon the court to resort to the well-equipped libraries in the neighboring judicial district of this circuit or libraries of state courts in order to ascertain and determine what is the applicable law of the Province of Quebec. This is a duty which should be performed by the attorneys for the respective parties in this case. The court suggests that the attorneys for the respective parties examine § 391 of the New York Civil Practice Act, which provides in substance that a printed copy of a statute of a foreign country is presumptive evidence of that statute. Since the applicable statutes of the Province of Quebec have not been sufficiently established to the satisfaction of this court it declines to take judicial notice of what those statutes may be and, therefore will deny the motion of the defendant . . . for summary judgment. /\n
\(^7^1\) Id. at 730-31.

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elements of a case are adequately accommodated. As indicated, however, judicial notice has merely become another technique for avoiding the foreign law problem. It has come to be regarded as a procedural and evidentiary principle, with the substantive effect of the doctrine being largely ignored. There seems to be more concern with the form of the statute—whether it is mandatory or permissive, whether or not it requires the parties to plead the foreign law before the court may take notice of it—than with a thorough examination of the relevant foreign law with a view toward reaching the same result that would be reached in the foreign jurisdiction. In other words, judicial notice has not been employed to realize the basic objective in the law of conflicts—the fair accommodation of foreign elements.

73 Dissatisfaction with the concept and the actual operation of judicial notice led to enactment in 1966 of FED. R. CIV. P. 44.1. See Advisory Committee Note to Rule 44.1, quoted in 5 J. MOORE, FEDERAL PRACTICE ¶ 44.1.01[2], at 1652-54 (2d ed. 1965). Prior to the enactment of the rule, federal courts seldom conducted their own research into foreign law and frequently refused to take judicial notice of the tenor of an alien statute. In Wall Street Traders v. Sociedad Espanola de Construcion Naval, 236 F. Supp. 358 (S.D.N.Y. 1963), for example, the court dismissed a libel in admiralty for failure to plead or prove the applicable Spanish law, noting:

An alternative would be for this court to take judicial notice of, and apply, the applicable Spanish law. The reason for the general rule that the federal courts will not take judicial notice of foreign laws... is that the ends of justice will be better served if the court has the aid of counsel in interpreting that law.


Under the liberalized procedure of rule 44.1, federal courts are free to conduct their own foreign law research, unimpeded by rules of evidence. While they have to some extent taken advantage of the new rule, see, e.g., Diaz v. Southeastern Drilling Co. of Argentina, S.A., 324 F. Supp. 1 (N.D. Tex. 1969), aff'd, 449 F.2d 258 (5th Cir. 1971), more commonly the courts continue their old practices. See, e.g., Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493 (5th Cir. 1973) (affirming dismissal of a wrongful death action on the ground that Texas courts would not apply “unfamiliar” remedial provisions of Mexican tort law, even though that law was held to be applicable and was proved); Argyll Shipping Co. v. Hanover Ins. Co., 297 F. Supp. 125 (S.D.N.Y. 1968) (in the absence of proof to the contrary the court will presume that the words “arising from general average” in the English version of the Japanese Commercial Code would mean the same thing that they do in the forum).

74 See generally Schlesinger, supra note 2, at 5.

75 Expressing a similar view is Miller, supra note 28, at 630. Another assessment of the judicial notice technique was offered by Professor Currie:

Judicial notice is a convenient rhetorical device for rationalizing—as we seem to have a compulsion to rationalize—the phenomenon of a court's taking ac-
Postscript to these Techniques

The resolution of the question of how to reach and apply foreign law by resort to judicial notice or presumptions may simultaneously dispose of the basic substantive question in each case involving foreign elements—whether the foreign law actually supplies the rule of decision. This latter question commonly is answered negatively when courts apply these techniques, as the effect of employing these techniques has often been to ignore or avoid the foreign law. Thus, although intended as mere procedural devices for amending the old common law fact rule, which frequently led to harsh consequences, these techniques have become devices for resolving the fundamental substantive issue, often in a way incompatible with the aims of the law of conflicts.

THE APPLICATION OF FOREIGN LAW IN THE COURTS

It must be admitted, of course, that the forum does not always resort to techniques for avoiding the foreign law; the courts occasionally do attempt actually to apply it. Yet even where the forum does not resort to an avoidance device but chooses squarely to face the conflict, foreign law nevertheless may not perform the function that is conventionally ascribed to it.

The function of foreign law is usually considered to be supplying the rule of decision if it is held applicable. In practice, however, it is not always applied in this manner. It does not operate like the law of the forum, and it is not applied in the same sense. Rather, foreign law is used in various ways with the common purpose of satisfying the forum’s sense of justice. While this notion will be developed more fully later, it is helpful to take a brief look at some of the ways in which foreign law has been applied.

count of matters not formally introduced in evidence. It cannot perform magic, and it can easily get out of hand. Judicial notice cannot dispense with the necessity of work to find the rule of decision.

Currie, supra note 1, at 34.

See, e.g., Currie, supra note 1, at 66. Professor Currie states that an exception to this view must be noted in nonconflicts matters, where the foreign law may serve as supplying a datum point. If, for example, a widow claims workmen’s compensation in New York for the death of her husband there or if she claims to be entitled as his widow under a New York will, and the validity of the marriage is governed by Italian law, then this is not a conflicts case at all, as New York law in both cases furnishes the rule of decision, and Italian law furnishes no more than a datum. Id. at 69-72, 177-78. The example is taken from Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y.S. 439 (3d Dept. 1931).

See text accompanying notes 142-53 infra.
Selective Application of Foreign Law

Even when it applies foreign law, the forum frequently applies only so much of that law as suits its purposes. This practice is exemplified by the Supreme Court's decision in *Tennessee Coal, Iron, & R. Co. v. George.* That case involved an Alabama statutory provision making an employer liable to his employee for injuries sustained by reason of defective equipment used in the course of the employer's business. Another provision required that suits to recover for such injuries "must be brought in a court of competent jurisdiction within the state of Alabama and not elsewhere." When suit under the Alabama provision was brought in Georgia, the Georgia court dismissed the complaint on the ground that the full faith and credit clause of the Constitution demanded adherence to the Alabama jurisdictional limitation. In reversing this decision, the Supreme Court held that the place of bringing the suit is not part of the cause of action since the cause of action was transitory:

[A] State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. The Court reached this decision despite its recognition of the responsibility imposed on the forum by the full faith and credit clause:

The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend.

The internal inconsistency and conceptual weakness of the Court's analysis are clearly pointed out in Judge Friendly's dissenting opinion in *Pearson v. Northeast Airlines, Inc.* The majority in that case held that a state may constitutionally apply the wrongful death statute of a sister state to determine whether the defendant was liable for the death, while refusing to enforce that statute's limitation on the amount of recovery. Judge Friendly stated:

An important reason why a forum state may not do this is that it thereby interferes with the proper freedom of action.

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78 233 U.S. 354 (1914).
79 Id. at 358, citing Ala. Code § 6115 (1907).
80 233 U.S. at 360.
81 Id.
83 Id. at 565.
of the legislature of the sister state. The terms and conditions of a claim created by statute inevitably reflect the legislature's balancing of those considerations that favor and of those that oppose the imposition of liability. The legislature may be quite unwilling to create the claim on terms allowing it to be enforced without limit of amount as most common law rights can be, or for a period bounded only by statutes of limitations ordinarily applicable. The Full Faith and Credit Clause insures that, in making its choice, the legislature creating the claim need not have to weigh the risk that the courts of sister states looking to its "public acts" as a source of rights will disregard substantial conditions which it has imposed . . . .

Putting aside the merits of the debate, Judge Friendly's analysis indicates the freedom with which the George Court selectively applied the foreign law. In finding the cause of action to be transitory and therefore maintainable in any competent jurisdiction, the Court could then ignore the foreign provision which would have prevented any application of the foreign law. The Court was obviously concerned with the injustice which might have ensued if the foreign cause of action had not been enforced:

[I]t would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the State nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama.

Further illustrating the tendency to apply foreign law selectively are those cases where the courts have applied the law of more than one jurisdiction, an action which is contrary to the traditional view that foreign law, if applied at all, must be applied in its original form. Ostensibly this practice is followed only when severable issue are involved in the case, but in fact it is not always clear that the issues are severable. The analysis of the Second Circuit in Pearson v. Northeast Airlines, Inc. is an example of this process. In that case a wrongful death action was filed in a New York federal district court by the survivor of a passenger who was killed in an

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84 The George holding may have been substantially weakened by Crider v. Zurich Ins. Co., 380 U.S. 39 (1965).
85 233 U.S. at 359.
86 One major reason for the traditional view is the quest for uniformity of result. Uniformity is possible only if the forum applies the foreign law in the same manner as the foreign jurisdiction would in deciding the case.
airplane crash in Massachusetts. Another action arising from the same accident had previously been maintained in the New York state courts. The New York Court of Appeals had ruled that under its choice-of-law rules the Massachusetts Wrongful Death Act governed the issue of liability. The New York court concluded, however, that recovery should not be limited to the $15,000 maximum imposed by the Massachusetts act. In Pearson the Second Circuit held that the state court of appeals' ruling was correct and that a legitimately interested state . . . may . . . apply a firmly fixed and long existing policy of its own, although this would remove a defense provided by an "integral" provision of the locus' statute creating the cause of action.

Thus, the court rejected the view that foreign law must constitutionally be applied in its entirety if it is applied at all.

Prior to Pearson it had been held that the forum state may constitutionally apply its own statute of limitations to bar a cause of action still viable in the foreign jurisdiction. However, the extent to which the forum may selectively apply foreign law, according to the Pearson majority, is not limited by any substance versus procedure distinction: "The niceties of such legal legerdemain do not concern us; it is the result that speaks loudly." The selective application of foreign law is supportable on the more general ground that "a state

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89 309 F.2d at 562.
90 The question in Pearson was posed as one of "the constitutional power of the states to develop conflicts of law doctrine." Id. at 555. This determination will necessarily reflect the extent to which the forum will or will not apply foreign law. Seen in this light, the significance of the approach rejected by the majority in Pearson becomes apparent. Briefly, the rejected argument is as follows: New York is not required to give any faith and credit to the Massachusetts act, but once it gives Massachusetts law some faith and credit it must also give it full faith and credit. Id. at 557 (emphasis in original).
92 309 F.2d at 558.
with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law.\textsuperscript{93}

As these cases suggest, the courts enjoy a considerable degree of flexibility in applying foreign law.\textsuperscript{94} The forum is free to use some or all of the foreign law, even under the approaches which regard choice-of-law rules as jurisdiction-selecting, rather than rule-selecting. How much of the foreign law is applied will depend upon the forum's sense of justice; the forum will look to foreign law for elements of its decision if that is what "justice" demands.

\textit{The Internal Law Approach Disguised}

As noted earlier, some courts avoid the application of foreign law by presuming that it is identical to the internal law of the forum.\textsuperscript{95} Other courts have accomplished the same result without resort to presumptions by simply distorting the conflicts approach which they purport to follow to adhere to a camouflaged internal law approach. This practice is exemplified by the court's opinion in \textit{Kitzman v. Werner}.\textsuperscript{96} That case involved an action in a Wisconsin state court by a Wisconsin woman to have her marriage to an epileptic declared valid. The marriage was performed in Minnesota. The defendant, as court-appointed guardian of the husband, contended that no valid marriage existed since Minnesota and Wisconsin statutes prohibited the plaintiff and her husband from entering into a marital relationship. The Wisconsin Supreme Court ruled that her marriage

\textsuperscript{93} \textit{Id.} at 559. It should be noted that the practice has been followed even where the foreign provision creating the cause of action has a "built-in" statute of limitations. In Lillegren v. Tengs, 375 P.2d 139 (Alas. 1962), for example, the Alaska court allowed an Alaskan citizen, injured in British Columbia, to recover from the Alaskan automobile owner under the British Columbian owner-liability law. This result was reached despite the fact that the foreign statute's built-in one-year limitation period had expired before suit was brought and despite the fact that Alaska had no owner-liability law. \textit{Cf. Nelson v. Eckert}, 231 Ark. 348, 329 S.W.2d 426 (1959).

\textit{Lillegren} has been criticized even by those who in other circumstances advocate selecting rules of decision from more than one legal system. \textit{See D. Cavers, The Choice-of-Law Process} 38-41 (1965).

\textsuperscript{94} Not only may a court utilize part of a foreign law in order to satisfy its sense of justice, it may reject that law outright while admitting that the foreign law would otherwise be applicable. For example, in \textit{Slater v. Mexican Nat'l R.R.}, 194 U.S. 120 (1904), Justice Holmes intimated that in cases where a tort is committed in an "uncivilized" country, extreme measures are demanded. \textit{Id.} at 129. That is, the forum may then apply its own law rather than the law of the place of injury which is traditionally applied.

\textsuperscript{95} \textit{See} text accompanying notes 31-56 \textit{supra}.

\textsuperscript{96} 167 Wis. 308, 166 N.W. 789 (1918).
was invalid because of her putative husband's epileptic condition. Minnesota law provided that "[n]o marriage shall be contracted . . . between parties either one of whom is epileptic . . . ." This provision, however, had been interpreted by the Minnesota courts to mean that any marriage attempted contrary to such statutory provisions is voidable only. The court then turned to Wisconsin law and noted that at the time of the ceremony Wisconsin prohibited the marriage of "insane person[s] and idiot[s]." It then concluded that the marriage was invalid, reasoning that "epilepsy is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity." This interpretation of Wisconsin law, according to the court, was strengthened by the recent statutory amendment adding epileptics to the list of persons incompetent to marry.

The court itself acknowledged the distinction between insanity and epilepsy; yet it held that the marriage offended the public policy of the forum and was, therefore, invalid. While purporting to follow a conflicts approach the court actually adhered to an internal law approach. In its view no conflict of laws existed. The public policies of the two states were equated and both purportedly applied. Kitzman should not be discounted as an aberration among cases involving foreign elements. There are other cases in which the conflict is ignored or distorted and internal law applied.

The opinion of the New York court in In re Peart's Estate further illustrates this practice. The plaintiff, a resident of New

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98 State v. Yoder, 113 Minn. 503, 130 N.W. 10 (1911).
99 Wis. Stat. § 2330 (1915).
100 167 Wis. at 315, 166 N.W. at 792.
101 Id. at 316, 166 N.W. at 792.
102 Id.
103 For an example of the appearance of the conflicts approach, see Benton & Brother v. Singleton, 114 Ga. 548, 40 S.E. 811 (1902).
York, applied for the letters of administration of his deceased wife's estate. He was opposed by the decedent's sister on the ground that their marriage was invalid. Plaintiff previously had obtained a divorce from his first wife in Virginia. The divorce decree provided that the marriage was dissolved but added the statutory requirement\(^{105}\) that neither party should marry again within four months from the date of entry of the decree. Within the four-month period plaintiff married the decedent in Maryland. The court concluded that this marriage was valid, despite the failure to comply with the condition imposed by Virginia law. Explicitly rejecting the authoritative interpretation of the Virginia statute by the state's highest court,\(^{106}\) the court regarded the divorce decree as final and absolute. In its view the marriage would be void in Virginia, but the public policy of New York directed that the marriage must be considered valid.\(^{107}\)

The fact that the court did not follow the conflicts approach is indicated not so much by the application of its internal law as by the rationale through which that decision was reached. The New York court ignored entirely the content of the authoritatively interpreted foreign statutory law. Under a conflicts approach the court would have recognized the content of that law and then rationalized, through an appropriate conflicts rule, its failure to apply that law.

As these cases indicate, the result of using an internal law approach in the conflicts setting is less than satisfactory. It neglects the community's need to perceive itself as affording due respect to the competing foreign law, thereby achieving a fair and reasoned result. Because of the obvious appearance of parochialism when the internal

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\(^{105}\) Id. at 65, 97 N.Y.S.2d at 882, citing VA. CODE § 20-118 as amended in 1934. The statute provided:

> On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, neither party shall be permitted to marry again for four months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree . . . until the expiration of such four months.

\(^{106}\) Id. This provision has subsequently been amended and the four-month requirement repealed. VA. CODE § 20-118 (1975).


The court said:

> [W]e hold that the dictum of the highest court of Virginia is not entitled to full faith and credit in this state, particularly where the rights of our own residents are being litigated; and that, even accepting the construction at its face value, we would still consider the decree of Virginia as an absolute and final one, with consequences . . . attaching in Virginia to a violation of one of its provisions—consequences which do not necessarily affect the finality of the decree of divorce in other states.

277 App. Div. at 68, 97 N.Y.S.2d at 885.
law approach is openly followed, attempts to disguise it as a conflicts approach, such as those described above, are frequently made.

The Adaptation of Foreign Law

Occasionally, courts are faced with foreign laws having no counterpart, wholly or partially, in the domestic legal system. The distinction between legal and equitable ownership in the English and American law of trusts, for example, does not exist in German law. In some countries this problem is handled through a doctrine known in German law as “Anpassung,” or adaptation. In cases of this type, a German judge will apply that part of the German law which is most similar to the foreign law. Through the Anpassung, the court seeks to eliminate or minimize the difference between the foreign and domestic rules. The adaptation should, to the greatest extent possible, preserve the essence of the foreign law, altering the foreign legal concept only to the extent that it retains the same meaning and effect as it has in its own system. While no doctrinal counterpart to Anpassung exists in our legal system, courts have sometimes handled this foreign law problem by looking to that feature of the domestic body of law which most closely resembles the idea in the foreign law to be applied.

Judge Learned Hand’s opinion in Wood & Selick, Inc. v. Compagnie Generale Transatlantique illustrates this adaptation process. The issue as framed by the court was whether bills of lading issued in France were sufficient to incorporate the French law of prescription. The bills provided that “litigations arising out of interpretation or execution” should be judged according to French law. The court characterized the testimony of the expert on French law relating to this issue as exceedingly confusing, not due to any fault of his, but inevitable because of the attempt to import into the French law the refined notion which pervades our own, of a right barred of remedy, but still existing in nubibus.

The court inquired whether the French code superimposed on the obligations created by the bills of lading a condition which is substan-

110 43 F.2d 941 (2d Cir. 1930).
111 Id.
112 Id. at 942.
tive in nature in that it barred the foreign right and not merely the remedy. In raising this question, Judge Hand observed: 113

The embarrassment is . . . that we have to interpret another system of law according to notions wholly foreign to it. . . . At any rate it is permissible for us to say that if the assumed extinguishment which the French law imposes, is itself subject to conditions which assimilate it to our ordinary statutes of limitation, it makes no difference that it speaks of "extinguishment." We are to decide whether the defense falls within one class or the other recognized by us, and in that inquiry we are not necessarily concluded by the terms used; we may assimilate it rather to matter of remedy, just because it has those conditions which would so determine it in our law.

Finding that the French law of prescription did not provide for the substance-procedure distinction inhering in American law, 114 the court attempted to adapt the foreign law to the domestic law of limitations in the manner most faithful to the essence of the foreign rule. As the court acknowledged, it did not strictly apply the foreign law, but only its idea of the Civil Code provision on prescription, which, admittedly, may be quite different from the intention of the French statute. 115 But in these instances the court does not apply its own interpretation of foreign law by choice, but rather out of necessity.

The strength of this adaptation technique and its relevance to the conflicts approach to the foreign law problem are underscored by comparing Wood & Selick with Bourinas v. Atlantic Maritime Co. 116 In that case the Second Circuit again faced the question of whether a foreign statute of limitations, in this case part of the Panamanian code, should be regarded as substantive or procedural. In order to make this determination, the court relied on a test, suggested in Davis v. Mills: 117 whether the limitation was "directed to the newly created liability so specifically as to warrant saying that it qualified the right." 118 In the court's view the merit of this test was that 119

113 Id. at 943.
114 Ironically, French law does in fact make a distinction roughly equivalent to that involved in Wood & Selick. The notion of "prescription" represents a limitation which bars a remedy and could therefore be characterized as procedural. The substantive limitation, which bars the right, is taken over by the French "déchéance."
115 43 F.2d at 943-44.
116 220 F.2d 152 (2d Cir. 1955).
117 194 U.S. 451 (1904).
119 Id. at 156-57.
It does not lead American courts into the necessity of examining into the unfamiliar peculiarities and refinements of different foreign legal systems, and where the question concerns the applicability of a code provision of a civil law country, this test seems more appropriate than any of the others. . . . [I]t at least furnishes a practical means of mitigating what is at best an artificial rule in the conflict of laws, without exposing us to the pitfalls inherent in prolonged excursions into foreign law. . . .

The distinction between these two cases is telling. The court in Wood & Selick felt it was bound to apply French law and, therefore, found it necessary to interpret provisions from the French code. It sought to accommodate the foreign elements by adapting the French law to the forum's legal norms. The facts that the adaptation did not actually conform to the basic idea in the foreign law and that the court may have been mistaken in its view of French law are for present purposes irrelevant. It matters only that the court acknowledged the conflict and then attempted to apply the foreign law in a manner sensitive to the ideas inherent in that law. The Bournias court rejected the adaptation approach. Making no effort to accommodate the foreign law, the court attempted to avoid any consideration of Panamanian law.120

The difference in their respective approaches clearly indicates that the two courts perceived their functions in applying foreign law to be quite different. While both recognized the inherent difficulties in reaching and applying foreign rules, Judge Hand nevertheless considered it to be the forum's responsibility to confront the foreign law on its own terms. The attitude expressed in Bournias, by contrast, was that since the forum cannot adequately handle the foreign law problem the preferable course is a retreat to its own legal notions. The Bournias approach ignores the basic function of foreign law in the conflicts approach: "applying" foreign law requires more than

120 Characterization of the issue as substantive or procedural is, of course, one of the easier methods of avoiding the foreign law question entirely. In Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919), for example, the court applied the Massachusetts "due care" statute, even though the auto accident occurred in Rhode Island, characterizing it as procedural. In so ruling, the court relied on Duggan v. Bay State Street Ry., 230 Mass. 370, 119 N.E. 757 (1918), a wholly internal case, for the proposition that: "The present statute simply affects procedure and the burden of proof. It does not work any modification of fundamental rights." Id. at 380, 119 N.E. at 761. A recent example of this type of rationalization in another context is Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (auto accident in Arizona; California statute allowing survival of actions, characterized as procedural, applied by California court).
mere reference to that law; it demands that foreign law be considered on its own terms.

ELEME NT S OF THE FOREIGN LAW PROBLEM

Reasons of Practicality

The commonly articulated explanation for the inability of courts to “reach” foreign law is the practical difficulty encountered in efforts to research and understand a foreign legal system. Several factors—language difficulties, variant legal systems, and varying methods of practice and procedure—exacerbate the problem of finding and interpreting foreign law. As one writer has stated:

121 The language difficulties are likely to be substantial, particularly if the foreign jurisdiction is not an Anglo-American jurisprudential system. One reason for the difficulty is that courts spend a great deal of time supplying technical definitions to words so that their meaning is other than that commonly understood. Professor Alan Watson recently has stated this problem in the context of comparative law:

Too much has to be taken on trust from other writers, including other comparatists, too often knowledge is derived from too few original sources, and too frequently linguistic deficiencies interpose a formidable barrier between the scholar and his subject. This last aspect must be emphasized. What in other contexts would be regarded as a good knowledge of a foreign language may not be adequate for the comparatist. Homonyms present traps. The French contrat, domicile, tribunal administratif, notaire, prescription and juge de paix, are not the English 'contract', 'domicile', 'administrative tribunal', 'notary public', 'prescription' and 'justice of the peace'.

A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 11 (1974) (footnote omitted) [hereinafter cited as WATSON].

A useful example of the language problem is found in American tax law. The tax courts in this country have defined the geographic source of income as the point where title to goods passes. Exelon Co., 45 B.T.A. 844 (1941); Ronrico Corp., 44 B.T.A. 1130 (1941). In Mexico, for example, there is also a concern with fixing the geographic source of income. They have defined source, however, to be that point where the contract of sale is executed. A. JIMENEZ, LEY DEL IMPUESTO SOBRE FORTunas Capitulo II, Articulo 60, Parrafos Primero y Segundo (Mexico 1954). In this context the normal translation of the Spanish word “fuentes” into the English word “source” probably would result in great misunderstanding. See Address by John C. McKenzie, ABA Section on International and Comparative Law, August 25, 1959. For another discussion of the difficulties encountered in transplantation, see Frank, Civil Law Influences on the Common Law—Some Reflections on “Comparative” and “Contrastive” Law, 104 U. PA. L. REV. 887, 916-20 (1956).

122 See Schlesinger, supra note 2, at 15.


124 In proposing various means of “discovering” foreign law, commentators have acknowledged the many hurdles facing counsel and the courts. See, e.g., Som-merich & Busch, supra note 14.

125 Zajtay, supra note 6, at 14-13. See also Nussbaum, The Problem, supra note 65.
Generally speaking the court has not the same certain and complete knowledge of foreign law as it possesses of the *lex fori*. This insufficient knowledge of foreign law, which is the natural consequence of the training of the judges in the law of their own country, affects decisively the circumstances in which the problem [of foreign law] arises.

These difficulties are not peculiar to American practice. Although civil law courts have employed other methods of reaching foreign law, their experiences reveal that the same possibility of misconstruing foreign law is present. In some continental courts, for example, written statements by experts, testimony of officially designated experts, and statements of foreign governmental officials serve as primary sources of evidence on the content of foreign law. These techniques have proved as ineffective in the process of attempting to understand foreign law as the previously discussed techniques employed by American courts.

**Prescriptive Reasons**

The judicial treatment of foreign law is also strongly affected by a basic prescriptive principle in the law of conflicts which dictates that foreign law must be applied as it would be by the courts of the foreign jurisdiction. In other words, the forum court must stand in the position of the courts of the foreign jurisdiction and “interpret the

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129 The basic weakness of these techniques is the limited scope of investigation which they permit. Their approach is unlike materially that of the comparative method utilized in other continental countries. See text accompanying notes 157-60 infra.

130 Expressions of this view are legion. Two recent examples are Eek, Peremptory Norms and Private International Law, 139 RECUEIL DES COURS 1, 18 (1973) (“The case should be decided as if it were being dealt with by a court in the *lex causae* country.”) and Zajtay, supra note 6:

When the rules of the conflict of laws of the *lex fori* require the application of foreign law, they clearly require that it should be applied correctly, namely, that the foreign rule should be applied exactly as it is in force in the country of its origin.  

rule of the applicable foreign law in accordance with the principles of the legal system in question.”

It is hoped that adherence to this principle will minimize the number of potentially conflicting or inconsistent decisions, thus leading to uniform results.

One traditional objective of conflicts rules has been to discourage forum shopping. Uniformity of result is thought to accomplish this goal. It is also prescribed as the most efficient means of achieving predictability, another basic goal in conflicts theory. It is felt that

131 Zajtay, supra note 6, at 14-24.

132 See, e.g., von Mehren, supra note 11, at 350. As long ago as the mid-nineteenth century, the ideal was stated to be that, in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or that. 8 F. Savigny, System des Heutigen Römischen Recht 27 (1829) (trans. W. Guthrie, Private International Law and the Retrospective Operation of Statutes 69-70 (2d ed. 1880)) (emphasis in original).

133 See, e.g., Linn v. Employers Reinsurance Corp., 392 Pa. 58, 139 A.2d 638 (1958), where the court stated:

We believe that in this day of multistate commercial transactions it is particularly desirable that the determination of the place of contracting be the same regardless of the state in which suit is brought. The absence of uniformity makes the rights and liabilities of the parties to a contract dependent upon the choice of the state in which suit is instituted and thus encourages “forum-shopping.” For this reason we chose [sic] to follow the established pattern of decisions and hold that acceptance by telephone of an offer takes place where the words are spoken.

Id. at 62, 139 A.2d at 640.

Some courts have limited the uniformity principle to cases involving consensual transactions, where the parties are able to plan in advance and where predictability is an especially important consideration. See, e.g., Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

134 The appeal of uniformity and predictability is not restricted to the conflicts setting. As Grant Gilmore has explained, it forms the foundation of much of our legal thinking:

To people who are professionally situated as lawyers are, the idea that the future is, or can be made, predictable is almost irresistibly appealing. “The object of our study,” Holmes told us, “is prediction” and went on to say that the very idea of law comes down to “prophecies of what the courts will do in fact, and nothing more pretentious . . . .” Instinctively, we nod approvingly . . . .

Closely allied, in the legal mind, with the idea of predictability is the idea of certainty. The two ideas, in the legal context, are so closely related as to be very nearly identical twins . . . .

Our obsessive need for certainty has led us to place a high premium on unity of doctrine . . . .

Our obsession with unity, certainty, and predictability has led us to convert those values into absolutes. Our goal—our Utopia—has been complete unity, total certainty, absolute predictability.


The goal of predictability is one justification for a jurisprudential system based upon precedent. Predictability is seen by some as a desirable end because “[h]uman beings . . . have a strong craving for security.” R. Wasserstrom, The Judicial
justice is achieved when the forum judge applies the rules of the legal system most "concerned" in the dispute, thereby disposing of the matter in a manner consistent with that followed in other jurisdictions.

Uniformity of result and the concomitant elimination of forum shopping are possible only through a restriction on jurisdiction or the adoption of a uniform standard prescribed by a higher legal system. In the absence of either, decisional harmony depends upon a shared perception of justice, a condition dependent upon the extent to which relevant values are shared. Differences with respect to the relevant values among the concerned communities are reflected in the variant standards applied by each community's legal order—the more the standards diverge, the more likely it is that the concerned legal orders will disagree as to a just outcome.

With respect to any given issue, all states might agree that jurisdiction is available in only one legal system. Because only one forum would be available, the choice among competing rules would turn solely on that court's determination as to the justice of the solutions offered by the several rules. But many considerations which are basic to our law of conflicts would be sacrificed by the adoption of such a scheme. The assumption of jurisdiction frequently depends upon the convenience of litigating in a particular jurisdiction and the facility of enforcing judgments, factors which do not always point to one jurisdiction. Assurance of uniformity through jurisdictional restrictions, then, seems undesirable.

Absent jurisdictional limitations, uniformity of result is possible only through adherence to a higher legal order. However, if the rules prescribed by a higher legal system are not also dispensed by that system, uniform results are unlikely, because it will continue to be necessary to interpret rules and interpretations frequently differ.

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135 Cf. von Mehren, supra note 11, at 350-51.
136 For an excellent exposition of the factors properly involved in the assumption of jurisdiction, see A. von Mehren & D. Trautman, The Law of Multistate Problems 630-36 (1965) [hereinafter cited as von Mehren & Trautman].

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Although the forum may turn to foreign law as supplying the rule of decision in a given case, the court will very likely interpret that law as if it were interpreting and applying a local rule. In the process of interpretation, a court is usually called upon to derive the rule for an individual case from specific foreign statutory provisions and general principles embodied in the particular legal system. Seldom will a foreign precedent completely cover the case before the court. Because of the forum's unfamiliarity with the foreign system, it is unlikely that its interpretation will be identical to that which would have been given by the courts of that foreign system. Even where there is a relationship between the two systems, as in the case of two sister states, there will still be a considerable disparity in the interpretative process. To some indefinable extent, then, the study of the foreign legal system will be subjectively selective.

But even assuming that uniformity of decision is a realistic goal, i.e., that it can be achieved in a significant proportion of instances, it is not, without more, a sufficient basis for an ideal model of how conflicts cases ought to be resolved. To require uniformity in the choice-of-law process is to formalize it without considering the nature of the substantive results that would follow in a predictable pattern. In short, uniformity may be a desirable attribute, but it does not assure the desirability of any conflicts model.

The Self-Ended Nature of Legal Systems

Behind these contributing factors to the foreign law problem,

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138 See Zajtay, supra note 6, at 14-24 n.149.

139 The difficulty of interpreting the laws of a foreign system is aggravated by the inconstant character of laws. It may not be sufficient for the forum to interpret a foreign rule literally, at least if an interpretation true to the foreign law is desired. The effect of any law may differ from time to time. See Watson, supra note 121, at 19-20.


141 Cf. Wasserstrom, supra note 134, at 60-66.
there lies an essentially jurisprudential explanation: the self-ended nature of legal systems generally and of the forum in particular. Any examination of this phenomenon must begin with a consideration of the fundamental differences between communities:142

In the contemporary world . . . individuals and enterprises often participate in the affairs of several communities; a single course of conduct may be viewed in differing economic, social, and political terms by each of the communities to which the activity is in some sense related.

That communities differ in their perceptions of desirable means and ends is evidenced by the very need for a law of conflicts which can accommodate in some fair and systematic way the different values in a given transaction.

An identity of language, form, and concept among the laws of different legal systems does not necessarily indicate an identity of the underlying values attending those laws. For example,143

[t]he fact that two systems share a general conception of contract tells us nothing definitive about the policies and values that these legal orders would desire to advance in the context of particular contractual problems.

This is not to say that the laws of different legal systems always reflect different values. Instances of similarity need not concern us, however, as they are not cases of true conflict. That is, if the substantive and procedural values inherent in a foreign law parallel those of the forum, then, assuming that the primary concern is with reaching a substantively just solution, it is immaterial which law is applied.

The most troubling cases in this field are those in which the respective values are different. In such a case, the difference usually, but not always, is indicated by a conceptual disagreement between the laws involved. While conceptual differences are the result of value disparities, they do not disclose all such disparities. Two apparently similar laws may be dissimilar in their underlying values.144 The cutting edge of a just and fair resolution in a conflict of laws is precisely the identification of these values.

Identification of competing values must begin with a statement of their discrepancy. The values may be discerned directly from the substantive law involved. Substantive rules are enacted to promote varying policies or interests, which in turn have varying degrees of

142 von Mehren, supra note 11, at 349.
143 Id. at 352.
144 See note 140 supra.

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specificity. For example, the common law fellow servant rule\textsuperscript{145} essentially provides that an injured employee cannot recover against the master if his injury was caused by the negligence of a fellow servant. Implicit in the rule is the notion that the most effective means of assuring due care among employees is admonition by each other and that such admonition is encouraged by denying recovery against the master to any employee injured by another. The rule serves other interests as well. It contributes to lower costs for the employer, and it may promote a sense of responsibility and independence in employees. Any or all of these interests may be involved in a single case to varying extents.

The values inherent in substantive laws may be identified fairly easily,\textsuperscript{146} but they do not represent all the legitimate interests that a legal system may have in a case. There remain more general values, such as the forum's interest in the procedures used to settle a dispute. This interest is not merely one of advancing the efficient administration of justice but also one of ensuring fairness in the procedural rules that govern litigation.\textsuperscript{147} A jurisdiction may also have a general interest in a case because a member of its community is involved in the dispute. The origin of this interest has been effectively stated elsewhere.\textsuperscript{148}

So long as there are separate communities in the world not all sharing the same values, each community will have, and on occasion will assert, a general concern on the basis of the fact that one of the parties belongs to that community.

This community value has seldom been articulated in recent decisions, but this does not mean that it does not exist or that it has no function in this process. It simply indicates that courts are reluctant to openly articulate an apparently provincial value.

\textsuperscript{145} The values inherent in the fellow servant rule are discussed in connection with the facts of Alabama R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892), in \textit{Von Mehren \& Trautman}, \textit{supra} note 136, at 105-09.

\textsuperscript{146} Professors von Mehren and Trautman have suggested as a general account of substantive concerns four categories of rules: (1) rules which express concern with the person (e.g., rules on the capacity of married women to contract); (2) rules which express concern with conduct (e.g., tort rules); (3) rules which express concern with private order (e.g., the bases of many contracts rules may be explained along this line); (4) rules which express concern for community order (e.g., criminal rules). \textit{Von Mehren \& Trautman}, \textit{supra} note 136, at 115-16.


\textsuperscript{148} \textit{Von Mehren \& Trautman}, \textit{supra} note 136, at 162.
The values inhering in a legal system, which reflect the values of the community as a whole, tend to be exclusive of the values of other systems. Every society regards its moral, social, and political values not as mere expedients, but rather as part of the natural order of things. Because of their essential quality, they are often marked by this exclusive characteristic.\(^{149}\)

It is this characteristic which best explains the tendency of legal systems to be self-ended. Unless there is frequent contact between the respective communities, legal systems will tend to prefer their own familiar values. They often lack an intelligent appreciation of the values inherent in a competing system. An understanding of another legal system can be acquired only through contact and, hence, familiarity with that system and its values. Absent this contact, the forum will examine unfamiliar laws as a foreigner,\(^{150}\) interpreting a foreign law in light of its own values. An objective examination and evaluation of the laws of another system, prescribed in the application of foreign law, requires some degree of empathy for the values peculiar to that system. Otherwise, the treatment of foreign law cannot be commensurate with that of domestic law.\(^{151}\)

Moreover, try as we may to apply the foreign law as it comes to us through the lips of the experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.

Thus, self-endedness does not mean that the forum necessarily tends to apply its own law or even to prefer its own substantive values.\(^{152}\) It rather suggests that because legal systems have little

\(^{149}\) See Lepaulle, The Function of Comparative Law, 35 Harv. L. Rev. 838, 858 (1922).

\(^{150}\) For an expression of this view, see Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). See text accompanying note 9 supra.

\(^{151}\) Conte v. Flota Mercante del Estado, 277 F.2d 664, 667 (2d Cir. 1960). Citing this passage, the court in Hernandez v. Cali, Inc., 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1969), aff'd, 27 N.Y.2d 903, 265 N.E.2d 921, 317 N.Y.S.2d 625 (1970), declined jurisdiction even though the maritime tort occurred in New York territorial waters. Since the owners of the vessel were Panamanian residents and the nonresident defendant stipulated to appear in Panamanian courts, the court concluded that the case should be tried in the Republic of Panama. It added: "[T]hat would be a forum where all parties would have some measure of familiarity with the law that must govern the case." 32 App. Div. 2d at 195, 301 N.Y.S.2d at 401. See also Currie, supra note 1, at 9.

\(^{152}\) The term is not synonymous with the "homeward trend" discussed by some writers. See, e.g., Nussbaum, supra note 65; Nussbaum, The Problem, supra note 65.
familiarity with other systems and their values, the forum's view of foreign law may be colored by the values of the forum community. The self-ended system\textsuperscript{153}

deals not with foreign values as such, but with its own idea of what these values must be. While it pays lip service to the finding and manipulating of foreign values, it actually remakes them in order to integrate them into its own system. The inclination toward self-endedness is an inherent element in the problem of applying foreign law. The other, more practical difficulties may be reduced, but this factor persists in a world where value systems, though interconnected, are not yet unified.

**CONCLUSION**

The problem that courts confront in attempting to apply foreign law is exceedingly difficult. The analysis in the preceding pages indicates the lack of success that courts have had in finding and applying foreign rules. What is needed are more sophisticated, comparative techniques which will enable courts to consider foreign law in a broader context than is now provided in this country. Courts must begin to interpret foreign laws in light of relevant cultural, geographical and, most important, political factors.\textsuperscript{154} Unless these factors are considered, it is quite probable that the statutory provision or case law applied in a particular case will not be one that a court of the foreign jurisdiction would select or that the forum's reading of the foreign rule will not mirror the foreign jurisdiction's understanding of the law. The law in fact applied is more likely to resemble the forum's law on the particular question.

Although the details of such comparative techniques are beyond the scope of this article, a useful starting point—at least in the context of conflicts with the laws of other nations\textsuperscript{155}—would be the experience of European courts in applying foreign law. Both litigants and courts in some continental countries have had much more flexibility in their attempts to come to grips with unfamiliar foreign laws.\textsuperscript{156} German and French courts in particular have benefitted from research conducted by comparative law centers.\textsuperscript{157} Upon the request


\textsuperscript{154} See Kahn-Freund, On the Uses and Misuses of Comparative Law, 37 Mod. L. Rev. 1 (1974).

\textsuperscript{155} The foreign law problem is clearest in this context. See note 3 supra.

\textsuperscript{156} See generally Europe, supra note 126; Sass, supra note 13.

\textsuperscript{157} In Germany, the Max Planck Institute for Foreign and International Private
of a court, the centers provide information and offer opinions on questions of foreign law. Because in some countries the burden of researching foreign law is placed on the court, considerable use is made of such institutes. The availability of this form of research assistance has relieved the burden to a considerable extent, obviating in most cases the need, for example, for expert witnesses.

This comparative approach to the foreign law problem appears to be a natural concomitant of a serious attitude in a legal system toward its responsibility to apply foreign law. Efforts in this direction are essential if the choice-of-law process is to function meaningfully and properly; it is not sufficient for a court to make mere reference to a foreign rule or for the court and the parties to engage in cursory research of the foreign law. These efforts may not be completely successful. Although they may eliminate many of the practical difficulties that contribute to the foreign law problem, they cannot overcome the inherent limitations upon the forum's ability to put aside its own values and consider objectively foreign laws. But recognition of these limitations must not lead to resignation; our sense of justice demands that the attempt be made to accommodate foreign elements.


On the workings of the Max Planck Institute, the best known of such comparative law centers, see generally Riegert, The Max Planck Institute for Foreign and International Private Law, 21 Ala. L. Rev. 475 (1969).

Austrian and German courts, for example, are required to conduct their own research of foreign law even where the parties offer no assistance whatsoever. Moreover, these courts take a very active role in framing the foreign law issue, quite apart from the proof of that law. Sass, supra note 13, at 357-59.

The drawbacks of reliance on expert witnesses in questions of foreign law are suggested in A. Ehrenzweig, Private International Law 192 (1967), and Ehrenzweig, supra note 10, at 365.

The paradigm of such an attitude would appear to be that of Germany. The West German provision on proof of foreign law goes even beyond our federal rule 44.1. Zivilprozessordnung § 293. See note 159 supra.